Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-967

HUGH E. BEARDEN, III, LILLIAN M. AGERS, ALBERT E. AGERS, BEVERLY CLEARY and DAVID HECKETHORN,
Appellants,

v.

HARDWARE MUTUAL CASUALTY COMPANY, a Corporation, et al.,
Appellees.

On Appeal from the Supreme Court of Missouri

JURISDICTIONAL STATEMENT

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No. .....

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HARDWARE MUTUAL CASUALTY COMPANY, a Corporation, et al.,
Appellees.

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JURISDICTIONAL STATEMENT

OPINIONS BELOW

The Order of the Missouri Court of Appeals, Saint Louis District, transferring said cause to the Supreme Court of Missouri en banc because of the question presented concerning the construction of the United States Constitution is and will not be published. It appears herein as Appendix A. The decision of the Supreme Court of Missouri is published and reported as *Hardware Mutual Casualty Co. v. Bearden*, Mo. Sup., 528 SW2d 754. It appears herein as Appendix B.

STATEMENT OF THE GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

(i) This is a civil action to determine whether liability insurance coverage is afforded various appellants who had judgments[1] against the driver of an automobile, appellant Bearden herein, for whom liability insurance coverage was carried by the owner of the automobile, appellee Executive Leasing Company (hereinafter Executive Leasing) through an insurance company, appellee Hardware Mutual Casualty Company (hereinafter Hardware Mutual). Said driver, appellant Bearden, had not himself maintained proof of financial responsibility with the Safety Responsibility Unit, Department of Revenue, State of Missouri and it was successfully contended below that because of appellant Bearden's failure to maintain such proof of financial responsibility appellant Bearden was not licensed under Chapter 303, Revised Statutes of Missouri. The status of appellant Bearden's driver's license is controlling herein for insurance coverage is inapplicable if appellant Bearden is validly unlicensed. All appellants appeal contending that Sections 302.309(1) and 303.150 (2) and 303.330, Revised Statutes of Missouri, 1959, are invalid as repugnant to the Fifth and Fourteenth Amendments to the Constitution of the United States. The decision of the Supreme Court of Missouri was in favor of the validity of such Sections, discussing, on the merits, in its decision, *Bell v. Burson*, 402 US 535, as inapplicable herein.

(ii) The judgment or decree sought to be reviewed is the decision of the Supreme Court of Missouri affirming the lower court

[1] Appellants Heckethorn and Cleary, passengers in the automobile driven by appellant Bearden had judgments against appellant Bearden in the sums of $60,000 (R. appellant Heckethorn's Ex. A) and $43,725 (R. appellant Cleary's Ex. A) respectively. Appellants Lillian and Albert Agers had judgment for $105,000 against appellant Bearden. Appellant Lillian Agers was the driver of the automobile with which appellant Bearden collided.

judgment in favor of appellees and against appellants. That ruling was issued and entered on September 8, 1975. Appellants' motions for rehearing were overruled on October 13, 1975. The Notice of Appeal by all appellants along with requisite proof of service of same was filed in the Supreme Court of Missouri, the court possessed of the record, on December 2, 1975. (R. 00900, 00901)

JURISDICTION

(iii) Jurisdiction of the appeal is conferred on this Court by Title 28 of the United States Code, Section 1257(2).

(iv) Cases believed to sustain the jurisdiction of this court are: *Goldberg v. Kelly*, 397 US 254; *Boddie v. Connecticut*, 401 US 371; *Fuentes v. Shevin*, 407 US 67; *Shapiro v. Thompson*, 394 US 618.

STATUTES INVOLVED

(v) The validity of Sections 302.309(1), 303.150(2) and 303.330 Revised Statutes of Missouri, 1969 (hereinafter RSMo) are herein involved. Section 302.309(1) states:

> "Whenever any operator's or chauffeur's license is suspended under Sections 302.302 to 302.309,[2] the director of revenue shall return the license to the operator or chauffeur immediately upon the termination of the period of sus-

[2] Sections 302.302 and 302.304(2) RSMo, 1969, were herein involved in the original suspension of thirty (30) days for excessive accumulation of points; also pertinent herein for return of license at end of thirty (30) day period of suspension is Section 302.309(1)(2); said sections are set out in full herein as Appendix C.

pension and upon the compliance with the requirements of Chapter 303,[3] RSMo."

Section 303.150(2) provides the requirements for reinstatement of driving privileges and is as follows:

> "Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed, nor shall any license be thereafter registered in the name of such person, until permitted under the motor vehicle laws of this state, and not then unless and until he shall give and *thereafter maintain* (appellants' emphasis) proof of financial responsibility."

QUESTION PRESENTED

The following question is presented by this appeal: Does a state financial responsibility statute that denies the licensee right to notice and evidentiary hearing on financial responsibility before his driver's license is suspended or re-suspended for failure to file or maintain proof of financial responsibility violate due process of law required by the Fifth and Fourteenth Amendments to the United States Constitution?

STATEMENT

I

Statement of the Facts of the Case Material to the Consideration of the Question Presented.

Appellee Hardware Mutual brought this declaratory judgment action to determine whether appellant Bearden, son and

[3] The requirements of pertinent Sections of Chapter 303, RSMo, 1969 are set out in full herein as Appendix D.

permissive user of the automobile leased by appellee Executive Leasing to appellant Bearden's father was afforded coverage under Hardware Mutual's liability insurance policy for the policy provided no coverage if the automobile was operated in violation of the terms of the lease (R. plaintiff's Ex. 1, rented and leased automobile endorsement, sheet No. 6)[4] and it was a violation of the lease for the car to be operated by an unlicensed driver (R. plaintiff's Ex. 2 and 3, paragraphs 9a and b). It was contended successfully below by appellee Hardware Mutual that appellant Bearden himself had the affirmative burden to maintain proof of financial responsibility as provided by Sections 303.150(2) and 303.330 RSMo, 1969 and as appellant Bearden did not have on file with the Director of Revenue of the Missouri Safety Responsibility Unit proof of financial responsibility at time of collision of September 4, 1967 he was unlicensed and hence there was no liability insurance coverage for Bearden or other appellants who as judgment creditors are similarly foreclosed. *Wackerle v. Pacific Employers Insurance Co.*, 219 F2d 1, 7 (8th Cir. 1955), cert. den. 349 US 955.

Originally, that is to say, at time of appellant Bearden's 30 day suspension for points accumulation under Section 302.302[5] in January, 1966 (R. plaintiff's Ex. 7, Ex. 2 and 3 therein), and in order to comply with Section 303.150(2) the Beardens requested the lessor, appellee Executive Leasing, to file proof of financial responsibility as provided by Section 303.170, Revised Statutes of Missouri.[6] Executive Leasing refused this request and

[4] Citations are to the certified record and in the certified record, reference is made to all exhibits in name of defendants or plaintiff as such designation made in the trial court still appears in the certified record before this court.

[5] Moving traffic violations within a certain prescribed period; see Appendix C.

[6] Section 303.170—Proof of responsibility by insurance certificate.

1. Proof of financial responsibility may be furnished by filing with the director the written certificate of any insurance carrier duly

indicated it did not want appellant Bearden driving the leased automobile (R. 00329).

In any event, as above stated, appellant Bearden's driver's license was reinstated on March 11, 1966 (R. plaintiff's Ex. 7, p. 8 and Ex. 1 therein) for he purchased a Chevrolet automobile and a Mission Insurance Company filed a proof of financial responsibility form under said Section 303.170, Revised Statutes of Missouri, on his behalf (R. plaintiff's Ex. 9, p. 8). When appellant Bearden's driver's license was reinstated from the thirty (30) day suspension for points accumulation, the lift notice of March, 1966 from the Missouri Department of Revenue included the following notice:

"Attention:

"The Future Proof Section of the Motor Vehicle Safety Responsibility Law Provides That a Subject Must Maintain Proof of His Financial Responsibility for a Period of Three Years. Failure to Do So Results in the Resuspension of Such Privileges. Therefore, You Will Be Required to File Proof of Your Financial Responsibility for the Future With This Unit Until January 21, 1969." (R. Plaintiff's Ex. 7, Ex. 9 therein)

Appellant Bearden drove the Chevrolet approximately two months before it quit running; he then stopped making premium payments on his Mission Insurance Company policy, which was

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authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. Such certificate shall give the effective date of such motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate by explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle.

2. No motor vehicle shall be or continue to be registered in the name of any person required to file proof of financial responsibility unless such motor vehicle is so designated in such a certificate.

cancelled in May, 1966 (R. plaintiff's Ex. 9, p. 7 therein). Upon cancellation, Mission Insurance Notified the Safety Responsibility Unit, Department of Revenue of Missouri, of its action (R. plaintiff's Ex. 9, Ex. 1D therein). Bearden's license was then suspended (resuspended, if you will) on July 28, 1966 for appellant Bearden's failure to refile proof of financial responsibility (R. plaintiff's Ex. 7, Ex. 15 therein). Appellant Bearden was to be notified of such action of resuspension after the fact, the notice being mailed to him on the same day as the order was received (R. plaintiff's Ex. 7, Ex. 15 therein). It is conceded that this notice of resuspension was misaddressed by such state agency as appellant Bearden's address was 7538 Hazelcrest, Hazelwood, Missouri; the mailing went to a nonexistent location: 7538 Hazelwood, Missouri (R. plaintiff's Ex. 7, Ex. 15 therein) and never received by appellant Bearden. No evidentiary hearing was or is provided anyway under the said notice not received or under the Missouri Safety Responsibility Law, Chapter 303, RSMo, 1969.

II

Facts Immaterial to the Consideration of the Question Presented Only So as to Show the Decision Below Does Not Rest on Any Adequate State Grounds.

Immaterial to the question presented within this court's jurisdiction, the lease charge on the automobile (including premium for liability insurance) was reduced $5 per month (R. 00295, 00297) but appellant Bearden was never excluded in writing on the lease or policy from driving the leased automobile and six (6) months later when the lease expired a new two (2) year lease was entered into not excluding appellant Bearden from driving the leased automobile (R. plaintiff's Ex. 3). Over a year later (September 4, 1967) and after this new two (2) year lease of September 30, 1966 to September 30, 1968 (R. plaintiff's Ex.

3), the automobile collision giving rise to this litigation occurred. Hence, it was appellants' contention below that insurance coverage was provided at time of accident of September 4, 1967 during time of second lease. The Missouri Supreme Court, under these facts of reduction in lease charge coupled with non written exclusion from the policy or lease according to the terms of the lease and insurance contract as to amendments, coupled with a new lease thereafter with again no written exclusion of appellant Bearden from coverage or from driving the leased automobile that appellant Bearden was otherwise afforded insurance coverage stated: "*we need not and do not decide (coverage under) that question*", instead basing its decision that the federal constitutional contentions of appellants and *Bell v. Burson*, 402 US 535, were unavailing and hence the constitutionality of Section 303.330 RSMo 1969 need not be reached in such regard. The reason why these issues immaterial to this court are pointed out is to make clear that the decision of the Missouri Supreme Court does *not* rest on any adequate state grounds but rests upon a finding necessarily made and disposed of by the Supreme Court of Missouri that the federal constitutional question posed by appellants were not well taken.

THE RAISING OF THE FEDERAL CONSTITUTIONAL ISSUE

As indicated by the order of the Missouri Court of Appeals, Saint Louis District, herein Appendix A, appellants raised the constitutional point of lack of notice and hearing on appellant Bearden's suspension for failure to refile proof of financial responsibility "at the first opportunity, kept the issue alive at every stage of the proceedings, presented the issue in their motions for new trial and covered the issue in their briefs." (Appendix A)

Appellants raised the federal constitutional due process issue initially in amended answers (a responsive pleading) (R. 00206,

R. 00207, R. 00211, R. 00216, R. 00220, R. 00221, R. 00230) to appellee Hardware Mutual's amended petition in the court of record of first instance in Missouri, the Circuit Court in the County of St. Louis. The method by which appellants carried the federal constitutional questions forward in the appellate courts below was by assignments of error in the Points Relied Upon (R. 00628, R. 00642-646, R. 00671, R. 00672, R. 00687, R. 00688, R. 00708-00717, R. 00810-00824) and Argument Sections of their Briefs on appeal and their Motions for Rehearing and Suggestions in Support Thereof (R. 00868, R. 00870-00872, R. 00874-00879).

THE FEDERAL CONSTITUTIONAL QUESTION IS SUBSTANTIAL

I

Due Process of Law Requires That Prior Actual Notice of Resuspension AND HEARING on Financial Responsibility Be Afforded Appellant Bearden Because the Issue of Financial Responsibility Is Central to the Missouri Statutory Scheme of Suspension, Reinstatement and Resuspension of Drivers' Licenses.

The Supreme Court of Missouri, the highest court in the State of Missouri, ruled en banc against appellants' federal constitutional claims asserting the notice and hearing required by *Bell v. Burson*, 402 US 535, inapplicable for, in the language of the Missouri Supreme Court: "*Bell* involved the failure to provide a hearing on the issue of fault prior to the suspension of the operator's license of a driver involved in an accident. Here, we are not dealing with a license suspension following an accident, where the issue of fault has not previously been determined by a hearing. We are dealing with a resuspension for failure to refile proof of financial responsibility, as required by Section 303.150(2) and the March 11, 1966, notice of reinstatement

as a condition of the continuance of driving privileges in the State of Missouri. This condition was not met by Hugh Bearden III. Thus, at the time of the collision on September 4, 1967, the operator's license of Hugh Bearden III was validly suspended and consequently he was driving the leased automobile in violation of Section 302.020(1)(2) Revised Statutes of Missouri.[7] Bearden's operation of the leased vehicle in contravention of state law constitutes a violation of paragraph 9(b) of the lease and this violation of the lease excludes insurance coverage." (Appendix B).

The action of the Safety Responsibility Unit, Department of Revenue, State of Missouri, in ordering suspension of appellant Bearden's driver's license in July, 1966, for his failure to refile and maintain proof of financial responsibility for three (3) years, provided no notice of such suspension (much less any prior notice) nor any opportunity whatsoever for evidentiary hearing of any type for him to show that, in fact, he then had automobile liability insurance coverage on the leased automobile he drove after the period of the original thirty (30) day suspension expired on March 11, 1966, when his driver's license was reinstated by the Director of Revenue, Missouri Safety Responsibility Unit and had what he thought was a valid driver's license on his person at time of accident of September 4, 1967. (R. Defendant Bearden's Ex. A, p. 20) Had appellant Bearden been given notice of the July 28, 1966 resuspension **and hearing** be-

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[7] Section 302.020 Operation of motor vehicle without proper license prohibited . . .

1. It shall be unlawful for any person, except those expressly exempted by section 302.080, to:

(1) Operate, as a chauffeur, any vehicle upon any highway in this state unless he has a valid license as a chauffeur under the provisions of this chapter;

(2) Operate, other than as a chauffeur, any motor vehicle, except farm tractor, upon any highway of this state unless he has a valid license as an operator under the provisions of this chapter. Any person holding a valid chauffeur's license shall not be required to procure an operator's license.

forehand or even before the collision of September 4, 1967 giving rise to this litigation, he could have shown that he no longer operated the Chevrolet, which had been covered by the lapsed Mission Insurance Company policy but thereafter and to such material time, date of collision September 4, 1967, and after a new two (2) year lease was entered into by his father as lessee and appellee Executive Leasing as lessor on September 30, 1966 (R. Plaintiff's Ex. 3), he operated as per terms of said lease the leased Mustang for which he was covered by Hardware Mutual's fleet policy, neither of which had ever been written so as to prohibit him from driving the leased automobile or so as to prohibit him from being afforded automobile liability insurance thereon.

It is respectfully submitted that the Supreme Court of Missouri holding the requirements of notice and hearing as set out in *Bell v. Burson* inapplicable was misdirected, as although *Bell v. Burson* dealt with a driver's license suspension following an accident, where the issue of fault had not previously been determined by hearing, *Bell* is nonetheless applicable for more basic and settled constitutional reasons articulated repeatedly by this court and ignored by the Supreme Court of Missouri. Appellants did not and do not contend *Bell v. Burson* applicable on the ground of a driver's license suspension following an accident where the issue of fault had not previously been determined by hearing. Appellants acknowledge there is no issue of fault herein. There *is* the issue of financial responsibility, however. *It was and is contended by appellants that the holding of Bell is controlling herein as Missouri's statutory law of financial responsibility makes failure to file (or refile as herein) proof of financial responsibility the factor in the Missouri Department of Revenue's determination to deprive appellant Bearden of his driver's license.*

II

Said Due Process Considerations Apply for the Missouri Safety Responsibility Statutory Scheme Does Not Bar Driver's Licenses to All Missouri Licensees Who Do Not File or Refile Proof of Financial Responsibility With the Department of Revenue, State of Missouri.

If the Missouri Safety Responsibility Statute barred reissuance (reinstatement, if you will) of driver's licenses to all motorists who did not file proof of financial responsibility the statute would not violate the due process considerations of the Fourteenth Amendment, *Bell v. Burson*, 402 US 535, loc. cit. 539. That is not the case herein for the Missouri Safety Responsibility scheme does not bar licenses to *all* Missouri drivers in such circumstances.[8]

Under *Bell* it does not follow, therefore, that the Fourteenth Amendment permits the Missouri statutory scheme where motorists involved in original suspension for points accumulation (herein for thirty (30) days) are required to file and maintain proof of future financial responsibility under penalty of loss of driver's licenses, while certain other Missouri motorists need not make such filing at all. *Bell*, loc. cit. p. 539; *Shapiro v. Thompson*, 394 US 618; *Frost & Frost Trucking Co. v. Railroad Comm'n*, 271 US 583.

In *Bell*, loc. cit. 402 US 537, this court stated "Questions concerning the requirement of proof of future financial responsibility are not before us." This case poses such question. *Bell* is applicable herein not because of any fault concept as expressed

[8] See Appendix D; for example, license suspensions are not made and license reinstatements are not barred to drivers or owners of vehicles involved in collisions not filing proof of financial responsibility if the vehicle involved was legally parked or operated without permission (in case of owner), Sections 303.030 and 303.070, RSMo., 1969.

in *Bell* but rather because of due process notice *and* opportunity to be heard evidentiarily on the issue of financial responsibility before the deprivation of appellant Bearden's license. If the right to notice and a hearing is to serve its full purpose, it must be granted at a time when the deprivation can still be prevented for when a person has an opportunity *provided* to speak up, substantively unfair and simply mistaken deprivations of property interests can be prevented. Herein the one-sided determination by appellee Hardware Mutual that no filings with the Director of Revenue of Missouri's Safety Responsibility Unit of proof of financial responsibility are made by them and the lack of hearing much less the lack of right to be heard on the issue of financial responsibility which is the core of the Missouri Safety Responsibility Law and central to said Missouri statutory scheme of "conditional reinstatement" of driver's licenses is destructive of such sense of fairness mandated repeatedly by this court under due process considerations of the Fourteenth Amendment.

III

The Divestment of Due Process Guarantees of Actual Prior Notice and Hearing on Financial Responsibility to Appellant Bearden by Couching Burden of Maintenance of Proof of Future Financial Responsibility With the Department of Revenue, State of Missouri, Upon Appellant Bearden, Himself, and Reinstatement of His License as Only "Conditional" Upon Appellant Bearden's Maintenance of Proof of Future Financial Responsibility With the Department of Revenue, State of Missouri, Is Constitutionally Impermissible as in Conflict With Past Applicable Decisions of This Court.

The so-called notice given to appellant Bearden in March, 1966, at time of "conditional" reinstatement of his driver's license that he must maintain proof of financial responsibility

until January 21, 1969 was merely illusory. What was he to do if appellees and his lessee father agreed by lease for him to drive the car but appellees refused to maintain proof of financial responsibility with the Department of Revenue, State of Missouri? Before he obtained the Mission Insurance policy to drive the Chevrolet—said policy being filed as proof of financial responsibility until the car quit running and appellant Bearden allowed the insurance to lapse—his parents asked appellees to file proof of financial responsibility and they refused (R. 00329) stating it was not their "policy" of doing so. Appellant had no right to question such "policy" with the Director of Revenue of the Missouri Safety Responsibility Unit. Like in *Bell* where Reverend Bell could not present his contention of absence of liability for fault in the negligence sense in causing the accident, the Director of Revenue in Missouri would only have been able to decide—Was the proof of financial responsibility filed or not—not, why not? Not even—appellants' contention herein—Is there a reasonable possibility of appellant Bearden having proof in fact of financial responsibility by virtue of his non-excluded status under the lease and the fleet insurance policy?

The lesson of *Funentes v. Shevin*, 407 US 67, in requiring appellant Bearden an opportunity to be heard, raises no impenetrable barriers to the taking of appellant Bearden's license. It only would have allowed the truth of actual fact of financial responsibility to have been brought out or not.

The Missouri Supreme Court holding the reinstatement of appellant Bearden's driving license as only a conditional reinstatement upon appellant Bearden's duty to *maintain* proof of financial responsibility with the state agency is in reality, in the language of *Frost v. Railroad Commission*, 271 US 583, no choice except a choice between the rock and the whirlpool—an option to forego a privilege which may be vital to his livelihood and to be burdened with over $200,000 in judg-

ments or to submit to a requirement which may constitute an intolerable burden as an insurance company must make the actual financial responsibility filing and if the insurance company refuses and fails to do so appellant Bearden's case necessarily fails even if he is covered in fact and has financial responsibility in fact. This is the very result which prior hearing means not to necessarily dictate."

Hence, the decision herein of the Missouri Supreme Court is in conflict with basic constitutional guarantees articulated by this court in the deprivation of appellant Bearden's driver's license for failure to make actual refiling of proof of financial responsibility. Such deprivation by casting such invalid affirmative burden upon appellant himself must fall before the paramount authority of the Constitution. If it stands in the conditional form which has been ascribed to it, constitutional guarantees so carefully safeguarded against direct assault are open to destruction by the indirect but no less effective process of requiring a surrender which though in form voluntary, in fact lacks none of the elements of compulsion.

Moreover, the Missouri Supreme Court's holding that appellant Bearden's driver's license was suspended at the time of the

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[9] In the language of *Frost*: "It would be a palpable incongruity to strike down an act of state legislation which by words of express divestments seeks to strip the citizen of rights guaranteed by the Federal Constitution but to uphold an act by which the same result is accomplished under the guise of a surrender of a right in exchange for a valuable privilege which the state threatens otherwise to withhold. It is not necessary to challenge the proposition that, as a general rule, the state, having power to deny a privilege altogether, may grant it upon such conditions as it sees fit to impose. But the power of the state in that respect is not unlimited and one of the limitations is that it may not impose *conditions* (emphasis these appellants') which require the relinquishment of constitutional rights. If the state may compel the surrender of one constitutional right as a condition of its favor, it may, in like manner, compel surrender of all. It is inconceivable that guarantees embedded in the Constitution of the United States may thus be manipulated out of existence." *Id.* p. 584.

accident, and, therefore, he was not insured because he failed to maintain proof of financial responsibility as his failure to maintain such proof created an "automatic" resuspension as reinstatement of his driver's license was only conditionally reinstated placed upon him a burden which constitutionally consistent with due process could not have validly been imposed upon him in the first instance to suspend his license, *Armstrong v. Manzo*, 380 US 545, 551[10] and is indeed ironic herein as the avowed purpose of Safety Responsibility Laws (and Missouri's is no exception) is to provide indemnity for innocent persons,[11] appellants Heckethorn, Agers and Cleary, severely injured on Missouri's highways by the negligence of another, appellant Bearden herein. Moreover, the irony of such approach is magnified when, as a matter of fact, had he been afforded hearing, appellant Bearden was financially responsible as a non-excluded driver within the lease and insurance contracts (R. plaintiff's Ex. 1, 2 and 3) at time of alleged resuspension of July 28, 1966 and thereafter to time of collision, September 4, 1967.

What is presented herein is a situation where appellant Bearden *has* liability insurance and is financially responsible but is declared *not to have* insurance and not to be financially responsible since an invalid affirmative burden is cast upon him that he himself did not maintain *proof* of financial responsibility even though he was covered under a liability insurance policy and was in fact financially responsible and his driver's license would not have been resuspended had he been afforded a hearing to prove such.

Does it need be repeated that the Missouri Supreme Court in its decision has not followed controlling cases of this court that

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[10] In *Armstrong* the constitutional infirmity of lack of notice was not cured by a hearing subsequently afforded (on a motion to set aside a decree) as then petitioner had the burden of proof which burden would not have been imposed had he been given timely notice in accord with the Constitution.

[11] *Winterton v. Van Zandt*, Mo. Sup., 351 S.W.2d 696, 700-701.

once licenses are issued, as in appellant Bearden's case, their continued possession as essential in the pursuit of a livelihood require that suspension or resuspension of such issued licenses to persons so situated as appellant Bearden herein involves state action and that such licenses may not be validly withheld without that procedural due process required by the Fourteenth Amendment. *Sniadach v. Family Finance Corp.*, 395 US 337, 89 S Ct 1820, 23 L Ed2d 349 (1969); *Goldberg v. Kelly*, 397 US 254, 90 S Ct 1011, 25 L Ed2d 287 (1970). These cases are but an application of the general proposition that relevant federal constitutional restraints limit state power to terminate an entitlement whether the entitlement is denominated a "right" or a "privilege." *Sherbert v. Verner*, 374 US 398 (disqualification for unemployment compensation); *Slochower v. Board of Higher Education*, 350 US 551 (discharge from public employment); *Speiser v. Randall*, 357 US 513 (denial of a tax exemption).

CONCLUSION

The case is one of first impression as to issue of financial responsibility and the decision below as to lack of due process being irrelevant conflicts with applicable decisions of this court. The federal constitutional questions presented by this appeal are so substantial and of such broad public importance as to require plenary consideration with brief on the merits and oral argument for resolution.

Respectfully submitted

COX, MOFFITT & COX

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Statement for Appellants

APPENDIX

APPENDIX A

In the Missouri Court of Appeals
St. Louis District
Division Three

January Session, 1975

Hardware Mutual Casualty Company, Plaintiff-Respondent, v. Hugh E. Bearden, III, Lilliam M. Agers, Albert E. Agers, Beverly Cleary, Karen Piersal and David Heckethorn, Defendants-Appellants.	Nos. 35671, 35672, 35675 and 35676. Appeal from the Circuit Court of the County of St. Louis. Hon. George E. Schaaf, Judge.

Order

Defendants in this declaratory judgment action, as one of their points on appeal, contend that § 303.330, RSMo 1969, is unconstitutional in that it fails to provide notice and hearing prior to suspension of a driver's license and thus violates due process of law. Bell v. Burson, 402 U.S. 535 (1971); Jennings v. Mahoney, 404 U.S. 25 (1971). Defendants raised the issue at the first opportunity, kept the issue alive at every stage of the proceedings, presented the issue in their motions for new trial and covered the issue in their briefs. City of St. Louis v. Butler Co., 358 Mo. 1221, 219 S.W.2d 372, 376 (banc 1949).

We believe that this cause involves the "construction" of the constitution, and therefore the jurisdiction of this appeal properly lies in the Supreme Court. Mo. Const. Art. V, § 3. Where a

party challenges the constitutionality of a statute, the Supreme Court has jurisdiction. State v. Hershman, 346 Mo. 892, 143 S.W.2d 1025 (1940); State v. Gilden, 143 S.W.2d 1027 (1940); Rose v. State Board of Registration for Healing Arts, 397 S.W. 2d 570, 571 (1966); Dittmeier v. Missouri Real Estate Commission, 316 S.W.2d 1, 2 (Mo.banc 1958); and Annbar Associates v. West Side Redevelopment Corp., 397 S.W.2d 635, 643 (Mo. banc 1966).

This cause does not merely involve the "application" of a constitutional provision but rather the determination of the meaning and proper effect of a constitutional provision (Due Process). Dorrance v. Dorrance, 242 Mo. 625, 148 S.W. 94, 98 (banc 1912); see Hill v. State Department of Public Health and Welfare, 503 S.W.2d 6, 7 (Mo.banc 1973). Defendants' contention is neither "merely colorable" nor "patently without merit." State v. Jackson, 444 S.W.2d 389, 391 (Mo.1969). Since the constitutional claim asserted has not been decided previously by our Supreme Court, we have no clear-cut precedent to apply. State ex rel. Doniphan Telephone Company v. Public Service Commission, 369 S.W.2d 572, 575-576 (Mo.1963). See also cases cited in Kansas City v. Howe, 416 S.W.2d 683, 687 (Mo. App.1967). Nor is the constitutional language involved so clear and unambiguous that we can apply it mechanically. E. B. Jones Motor Company v. Industrial Commission, 298 S.W.2d 407, 410 (Mo.1957). See also authorities cited in City of Joplin v. Village of Shoal Creek Drive, 434 S.W.2d 25, 28 (Mo.App. 1968).

Since we believe that the Supreme Court has jurisdiction, it is ordered that the cause be transferred to the Supreme Court.

GERALD M. SMITH
Chief Judge

APPENDIX B

In the Supreme Court of Missouri
En Banc

Hardware Mutual Casualty Company, a Corporation, Respondent, vs. Hugh E. Bearden, III, et al., Appellants, Executive Auto Leasing Company, a Corporation, Third-Party Defendant-Respondent.	No. 59025.

Appeal from the Circuit Court of the County of St. Louis
Within the Twenty-First Judicial Circuit, Division 1
Honorable George E. Schaaf, Judge

On September 4, 1967, Hugh E. Bearden, III, was the driver of a 1965 Ford Mustang which collided with an automobile driven by Lillian Agers, wife of Albert Agers. The Agers are appellants herein, along with Beverly Cleary and David Heckethorn, passengers in the Bearden vehicle, all of whom obtained judgments against Hugh Bearden, III. Karen Piersal, a third passenger in the Bearden vehicle, is not a party to this appeal.

The automobile which Bearden was driving at the time of the collision was leased from Executive Auto Leasing Company on September 30, 1964, by his father, Hugh E. Bearden, Jr. Plaintiff Hardware Mutual Insurance Company insured the Bearden vehicle under a fleet policy covering automobiles leased by

Executive. Hardware Mutual brought this declaratory judgment action to determine whether Hugh Bearden, III, was covered under the policy. Appellants brought Executive into the suit as a third-party defendant.

The Circuit Court of St. Louis County held for Hardware Mutual and Executive, finding that Hugh Bearden, III, was not covered by the policy issued by plaintiff to Executive Auto Leasing. The case was appealed to the Missouri Court of Appeals, St. Louis District. After submiission, but prior to opinion, that Court transferred the case to this Court on the jurisdictional basis of the constitutionality of § 303.330, RSMo 1969. In view of our disposition of the case, we do not reach the constitutional question. However, jurisdiction once acquired is not lost because the appeal may be disposed of on other grounds. State ex rel. State Highway Commission v. Wiggins, 454 S.W.2d 899, 902 (Mo. banc 1970).

With respect to the fleet policy involved here, by arrangement between Hardware Mutual and Executive, the insurer charged Executive a fixed premium on each automobile for which Executive agreed to provide coverage. The premium charged by Hardware Mutual did not vary with the number of drivers or their ages. However, Executive screened the applicants for insurance because the fixed charge per vehicle it paid would increase in the following year if Executive's loss experience was poor.

The lease was to run for a period of 24 months at the rate of $108 per month. Twenty dollars of this amount related to insurance coverage. At the end of the initial lease period, the lease was "reprogrammed" on September 30, 1966, for an additional 24 months.

Paragraph 9(b) of the lease provides:

> "Lessee shall not permit any of said motor vehicle(s) to be used in violation of any Federal, State and municipal statutes, laws, ordinances, rules or regulations. * * *."

Exclusion 4(V) of the "Rented and Leased Automobile Endorsement" to the Hardware Mutual insurance policy provides that there shall be no coverage:

> "Except with respect to the named insured, while the automobile is used or operated in violation of the terms of the rental or lease agreement, applicable thereto."

On January 21, 1966, the operator's license of Hugh Bearden, III, was suspended for 30 days due to an excessive accumulation of points. § 302.304(2), RSMo 1969. Appellants do not contest the validity of this suspension.

Section 302.309(1) provides:

> "Whenever any operator's or chauffeur's license is suspended under sections 302.302 to 302.309, the director of revenue shall return the license to the operator or chauffeur immediately upon the termination of the period of suspension *and upon compliance with the requirements of chapter 303, RSMo.*" (Emphasis added.)

"Thus, the operator is entitled to his license again at the end of the suspension only 'upon compliance with the requirements of chapter 303, RSMo.'" Biersmith v. Schaffner, 477 S.W.2d 121, 122 (Mo. banc 1972). The requirements for reinstatement of driving privileges are found in § 303.150(2), which provides as follows:

> "Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed, nor shall any license be thereafter registered in the name of such person, until permitted under the motor vehicle

laws of this state, *and not then unless and until he shall give and thereafter maintain proof of financial responsibility*." (Emphasis added.)

"When following termination of the specified period of suspension, an operator complies with § 303.150(2), he is entitled to reinstatement of his driving privileges, *but the burden is on the operator to furnish the proof of responsibility required by Chapter 303*." (Emphasis added.) *Biersmith v. Schaffner*, supra, at 122.

In order to comply with § 303.150(2), a telephone call was made to Executive by a man who identified himself as Hugh Bearden, Jr. The caller requested Executive to file an S. R. 22 form with the Safety Responsibility Unit showing that his son, Hugh Bearden, III, was covered by liability insurance. Executive refused this request and indicated it did not want Hugh Bearden, III, driving the leased automobile.

A second call to Executive was made by a woman who identified herself as Mrs. Bearden. This discussion concerned a reduction in monthly lease payments if Hugh Bearden, III, was removed from coverage under Executive's fleet policy. Shortly after this conversation Executive received the following note:

"Please remove Hugh E. Bearden, Jr., from our ins. policy as his license was revoked and I am the only one driving at this time. I bought him a 1956 Chev. and he has filed an S. R. Form and has ins. to drive it. Mr. H. E. Bearden, 7538 Hazelcrest, St. Louis, 42, Missouri."

Pursuant to this note, Executive lowered the monthly lease rental by $5.00 to reflect the absence of coverage of Hugh Bearden, III, under the insurance policy.

Hugh Bearden, III's, license was reinstated on March 11, 1966, pursuant to his having demonstrated proof of financial

responsibility by obtaining an auto liability insurance policy from Mission Insurance Company covering his use of the 1956 Chevrolet.

The "official lift notice of suspension" gave Hugh Bearden, III, the privilege of driving only the 1956 Chevrolet. The form used by the Department of Revenue lists other extended driving privileges, such as operating non-owned vehicles, which may be given to a person upon reinstatement of his license. However, none of the boxes to the left of any of these other driving privileges were checked with respect to Hugh Bearden, III. The official lift notice also included the following condition:

"*ATTENTION:*

"THE FUTURE PROOF SECTION OF THE MOTOR VEHICLE SAFETY RESPONSIBILITY LAW PROVIDES THAT A SUBJECT MUST MAINTAIN PROOF OF HIS FINANCIAL RESPONSIBILITY FOR A PERIOD OF THREE YEARS. FAILURE TO DO SO RESULTS IN THE RESUSPENSION OF SUCH PRIVILEGES. THEREFORE, YOU WILL BE REQUIRED TO FILE PROOF OF YOUR FINANCIAL RESPONSIBILITY FOR THE FUTURE WITH THIS UNIT UNTIL JANUARY 21, 1969."

Hugh Bearden, III, drove the Chevrolet approximately two months before it quit running and was junked. He then stopped making premium payments on his Mission Insurance Company policy, which was canceled in May, 1966. Upon cancellation, Mission Insurance Company notified the Safety Responsibility Unit of its action. Bearden's license was then resuspended on July 28, 1966, for failure to refile proof of financial responsibility. The notice of resuspension was misaddressed and Hugh Bearden, III, denies having ever received it. We consider this fact immaterial because the March 11th reinstatement notice

provided Hugh Bearden, III, with actual notice of the consequences of his failure to maintain liability insurance.

When the Mission policy was canceled for nonpayment of premiums, Hugh Bearden, III, did nothing in the way of furnishing the proof of financial responsibility required by § 303.150(2) and the express conditions of the March 11th lift notice of his suspension. Hugh Bearden, III, contends that even though the Mission policy was canceled, he was still covered by Executive's policy with Hardware Mutual, notwithstanding the fact that Executive had previously refused to file an S. R. 22 form on his behalf, and he never again requested Executive to acknowledge coverage for him. Again, the burden was on Hugh Bearden, III, to maintain *proof* of financial responsibility. *Biersmith v. Schaffner*, supra. There was never any proof filed after the May, 1966, cancellation of the Mission policy. Although we doubt, under the particular facts of this case, that Hugh Bearden, III, was otherwise covered under Executive's policy, we need not and do not decide that question.

We have previously determined that Hugh Bearden, III, was required to maintain liability insurance as a condition of the continuance of his driving privileges. Section 303.330, RSMo 1969, provides that "[a]ny person * * * whose policy of insurance * * *, when required under this chapter, shall have been canceled or terminated, * * * shall immediately return his license and registration to the director * * *."

Hugh Bearden, III, contends that the July, 1966, resuspension was invalid and that § 303.330 is unconstitutional because it does not provide for notice and a hearing prior to suspension of a person's operator's license, citing Bell v. Burson, 402 U. S. 535 (1971).

We need not, and should not, decide the constitutionality of § 303.330 in this case. The *Bell* case involved the failure to pro-

vide a hearing on the issue of fault prior to the suspension of the operator's license of a driver involved in an accident. Here, we are not dealing with a license suspension following an accident, where the issue of fault has not previously been determined by a hearing. We are dealing with a *resuspension* for failure to refile proof of financial responsibility, as required by § 303.150(2) and the March 11, 1966, notice of reinstatement as a *condition* of the continuance of driving privileges in the State of Missouri. This condition was not met by Hugh Bearden, III. Thus, at the time of the collision on September 4, 1967, the operator's license of Hugh Bearden, III, was validly suspended and consequently, he was driving the leased automobile in violation of § 302.020(1) (2), RSMo 1969, and was subject to prosecution under § 303.370(3), RSMo 1969. The *Bell* holding is not applicable to the facts in the present case because the issue of fault is not involved here. Cf. State v. Hanson, 493 S.W.2d 8, 13 (Mo. App. 1973).

Bearden's operation of the leased vehicle in contravention of state law constitutes a violation of paragraph 9(b) of the lease, supra; and this violation of the lease renders exclusion (V) of the insurance policy, supra, operative so as to exclude coverage in this case.

Appellants contend exclusion (V) is inapplicable because Hugh Bearden, Jr. "should be held to be a named insured," as specified in paragraph 7(b) of the lease. This contention is without merit. The exception stated in exclusion (V), if applicable at all to Hugh Bearden, Jr., assuming he is entitled to the status of a named insured, clearly refers to *use* or *operation* by the named insured; and not use or operation by a permittee, or *allowance* of use by the named insured to a permittee. Exclusion (V) does not provide for or contemplate coverage where a *permittee* has used or operated the leased automobile in violation of the terms of the lease agreement.

Accordingly, we hold Hugh E. Bearden, III, was not covered by the Hardware Mutual policy at the time of the collision. Appellants, as judgment creditors, are similarly foreclosed in that they stand in the shoes of the insured, Hugh Bearden, III, through whom they assert their claims. Greer v. Zurich Ins. Co., 441 S.W.2d 15, 30 (Mo. 1969); Wackerle v. Pacific Employers Insurance Co., 219 F.2d 1, 7 (8th Cir. 1955), cert. den. 349 U.S. 955.

The judgment is affirmed.

ROBERT T. DONNELLY
Judge

All concur.

APPENDIX C

Section 302.302—Point System—assessment for violations

1. The director of revenue shall put into effect a point system for the suspension and revocation of chauffeurs' and operator's licenses. Points shall be assessed only after a conviction or forfeiture of collateral. The initial point value is as follows:

(1) Any moving violation of a state law or county or municipal traffic ordinance not listed in this section, other than a violation of vehicle equipment provisions .....2 points (except any violation of a municipal stop sign ordinance where no accident is involved, 1 point)

(2) Speeding

In violation of a state law .....3 points

In violation of a county or municipal ordinance .....2 points

(3) Leaving the scene of an accident in violation of section 564.450 RSMo .....12 points

In violation of any county or municipal ordinance ...6 points

(4) Careless and imprudent driving

In violation of section 304.015, subsection 4, RSMo ..4 points

In violation of a county or municipal ordinance .....2 points

(5) Operating without a license after suspension or revocation and prior to restoration of operating privileges which have been suspended or revoked .....12 points

(6) Obtaining a license by misrepresentation ..12 points

(7) Driving while in an intoxicated condition or under the

influence of narcotic drugs

In violation of state law ..... 12 points

In violation of a county or municipal ordinance ..... 6 points

(8) Any felony involving the use of a motor vehicle ..... 12 points

(9) Knowingly permitting unlicensed operator to operate a motor vehicle ..... 4 points

2. An additional two points shall be assessed when personal injury or property damage results from any violation listed in subsection 1 and if found to be warranted and certified by the reporting court.

3. When any of the acts listed in subdivision (2), (3), (4) or (7) of subsection 1 constitutes both a violation of a state law and a violation of a county or municipal ordinance, points may be assessed for either violation but not for both.

Section 302.304—Notice of points—revocation of operating privileges—point value of reinstated license

The director shall:

(1) Notify by ordinary mail any operator or chauffeur of the point value charged against his record when the record shows four or more points have been accumulated in a twelve-month period;

(2) Suspend the operating privileges of any person whose driving record shows he had obtained or accumulated eight points in eighteen months. The time of suspension shall not be less than thirty days nor more than ninety days;

(3) Revoke the operating privileges of any person when his driving record shows he has obtained or accumulated twelve

points in twelve months or eighteen points in twenty-four months or twenty-four points in thirty-six months;

(4) Upon issuing a reinstated operator's or chauffeur's license, reduce the accumulated point value to six points.

Section 302.309—Return of license at end of suspension or revocation—limited hardship licenses

1. Whenever any operator's or chauffeur's license is suspended under sections 302.302 to 302.309, the director of revenue shall return the license to the operator or chauffeur immediately upon the termination of the period of suspension and upon compliance with the requirements of chapter 303, RSMo.

2. Any operator or chauffeur whose license is revoked under these sections, upon the termination of the period of revocation, shall apply for a new license in the manner prescribed by law.

APPENDIX D

Section 303.020 (10)

(10) "Proof of financial responsibility", proof of ability to respond in damages for liability, on account of accidents occurring subsequent to the effective date of said proof, arising out of the ownership, maintenance or use of a motor vehicle, in the amount of ten thousand dollars because of bodily injury to or death of one person in any one accident, and, subject to said limit for one person, in the amount of twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident and in the amount of two thousand dollars because of injury to or destruction of property of others in any one accident.

Section 303.030 Operator's license suspended on failure to give security for payment of damages after accident—exceptions—insurance accepted

1. If within twenty days after the receipt of a report of a motor vehicle accident within this state which has resulted in bodily injury or death, or damage to the property of any one person in excess of one hundred dollars, the director does not have on file evidence satisfactory to him that the person who would otherwise be required to file security under subsection 2 of this section has been released from liability, or has been finally adjudicated not to be liable, or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments with respect to all claims for injuries or damages resulting from the accident, the director shall determine the amount of security which shall be sufficient in his judgment to satisfy any judgment for damages resulting from such accident as may be recovered against each operator or owner.

2. The director shall, within ninety days after the receipt of such report of a motor vehicle accident, suspend the license of each operator, and all registrations of each owner of a motor vehicle, in any manner involved in such accident, and if such operator is a nonresident the privilege of operating a motor vehicle within this state, and if such owner is a nonresident the privilege of the use within this state of any motor vehicle owned by him, unless such operator or owner or both shall deposit security in the sum so determined by the director; provided notice of such suspension shall be sent by the director to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security.

3. Where erroneous information is given the director with respect to the matters set forth in subdivision (1), (2), or (3) of subsection 4 of this section, he shall take appropriate action as hereinbefore provided, within forty-five days after receipt by him of correct information with respect to said matters.

4. This section shall not apply under the conditions stated in section 303.070, nor:

(1) To such operator or owner if such owner had in effect at the time of such accident an automobile liability policy with respect to the motor vehicle involved in such accident;

(2) To such operator, if not the owner of such motor vehicle, if there was in effect at the time of such accident an automobile liability policy or bond with respect to his operation of motor vehicles not owned by him;

(3) To such operator or owner if the liability of such operator or owner for damages resulting from such accident is, in the judgment of the director, covered by any other form of liability insurance policy or bond; nor

(4) To any person qualifying as a self-insurer under section 303.220, nor to any person operating a motor vehicle for such self-insurer.

5. No such policy or bond shall be effective under this section unless issued by an insurance company or surety company authorized to do business in this state, except that if such motor vehicle was not registered in this state, or was a motor vehicle which was registered elsewhere than in this state at the effective date of the policy or bond, or the most recent renewal thereof, such policy or bond shall not be effective under this section unless the insurance company or surety company, if not authorized to do business in this state, shall execute a power of attorney authorizing the director to accept service on its behalf of notice or process in any action upon such policy or bond arising out of such accident; provided, however, every such policy or bond is subject, if the accident has resulted in bodily injury or death, to a limit, exclusive of interest and costs, of not less than ten thousand dollars because of bodily injury to or death of one person in any one accident and, subject to said limit for one person, to a limit of not less than twenty thousand dollars because of bodily injury to or death of two or more persons in any one accident, and, if the accident has resulted in injury to or destruction of property, to a limit of not less than two thousand dollars because of injury to or destruction of property of others in any one accident.

Section 303.070 Operator not subject to security and suspension provisions, when

The requirements as to security and suspension in section 303.030 shall not apply:

(1) To the operator or the owner of a motor vehicle involved in an accident wherein no injury or damage was caused to the person or property of anyone other than such operator or owner;

(2) To the operator or the owner of a motor vehicle legally parked at the time of the accident;

(3) To the owner of a motor vehicle if at the time of the accident the vehicle was being operated without his permission, express or implied, or was parked by a person who had been operating such motor vehicle without such permission; nor

(4) If, prior to the date that the director would otherwise suspend the license and registration or nonresident's operating privilege under section 303.030, there shall be filed with the director evidence satisfactory to him that the person who would otherwise be required to file security has been released from liability or been finally adjudicated not to be liable or has executed a duly acknowledged written agreement providing for the payment of an agreed amount in installments, with respect to all claims for injuries or damages resulting from the accident.

Section 303.150 Vehicle registration suspended on suspension of license for conviction or bail forfeiture—proof required for reregistration.

1. Whenever the director, under any law of this state, suspends or revokes the license of any person upon receiving record of a conviction or a forfeiture of bail, the director shall also suspend the registration for all motor vehicles registered in the name of such person, except that he shall not suspend such registration, unless otherwise required by law, if such person has previously given or shall immediately give and thereafter maintain proof of financial responsibility with respect to all motor vehicles registered by such person.

2. Such license and registration shall remain suspended or revoked and shall not at any time thereafter be renewed, nor shall any license be thereafter issued to such person, nor shall any motor vehicle be thereafter registered in the name of such

person, until permitted under the motor vehicle laws of this state, and not then unless and until he shall give and thereafter maintain proof of financial responsibility.

3. If a person is not licensed, but by final order or judgment is convicted of or forfeits any bail or collateral deposited to secure an appearance for trial for any offense requiring the suspension or revocation of license, or for operating a motor vehicle upon the highways without being licensed to do so, or for operating an unregistered motor vehicle upon the highways, no license shall be thereafter issued to such person and no motor vehicle shall continue to be registered or thereafter be registered in the name of such person, until he shall give and thereafter maintain proof of financial responsibility.

4. Whenever the director suspends or revokes a nonresident's operating privilege by reason of a conviction or forfeiture of bail, such privilege shall remain so suspended or revoked unless such person shall have previously given or shall immediately give and thereafter maintain proof of financial responsibility.

Section 303.160 Proof of financial responsibility, how given.

1. Proof of financial responsibility when required under this chapter with respect to a motor vehicle or with respect to a person who is not the owner of a motor vehicle may be given by filing:

(1) A certificate of insurance as provided in section 303.170 or section 303.180; or

(2) A bond as provided in section 303.230; or

(3) A certificate of deposit of money or securities as provided in section 303.240; or

(4) A certificate of self-insurance, as provided in section 303.220, supplemented by an agreement by the self-insurer

that, with respect to accidents occurring while the certificate is in force, he will pay the same judgments and in the same amounts that an insurer would have been obligated to pay under an owner's motor vehicle liability policy if it had issued such a policy to said self-insurer.

2. No motor vehicle shall be or continue to be registered in the name of any person required to file proof of financial responsibility unless such proof shall be furnished for such motor vehicle.

Section 303.170 Proof of responsibility by insurance certificate.

1. Proof of financial responsibility may be furnished by filing with the director the written certificate of any insurance carrier duly authorized to do business in this state certifying that there is in effect a motor vehicle liability policy for the benefit of the person required to furnish proof of financial responsibility. Such certificate shall give the effective date of such motor vehicle liability policy, which date shall be the same as the effective date of the certificate, and shall designate by explicit description or by appropriate reference all motor vehicles covered thereby, unless the policy is issued to a person who is not the owner of a motor vehicle.

2. No motor vehicle shall be or continue to be registered in the name of any person required to file proof of financial responsibility unless such motor vehicle is so designated in such a certificate.

Section 303.330 License and registration returned to director, when

Any person whose license or registration shall have been suspended as herein provided, or whose policy of insurance or bond, when required under this chapter, shall have been can-

celed or terminated, or who shall neglect to furnish other proof upon request of the director shall immediately return his license and registration to the director. If any person shall fail to return to the director the license or registration as provided herein, the director shall forthwith direct the Missouri state highway patrol or any peace officer to secure possession thereof and return the same to the director.

APPENDIX E

In the Supreme Court
State of Missouri

Hardware Mutual Casualty Company, a Corporation, Respondent, vs. Hugh E. Bearden, III, et al., Appellants, Executive Auto Leasing Company, a Corporation, Third-Party Defendant-Respondent.	No. 59025.

Notice of Appeal to the Supreme Court of the United States

Notice is hereby given that David Heckethorn, Lillian and Albert Agers, Hugh E. Bearden, III and Beverly Cleary, appellants above named, hereby appeal to the Supreme Court of the United States from the final judgment of the Supreme Court of Missouri affirming the judgment in favor of plaintiff and third party defendant and against appellants entered in this cause on September 8, 1975 and in overruling appellants' motions for rehearing on October 13, 1975.

This appeal is taken pursuant to 28 USC § 1257(2).

COX, MOFFITT & COX
/s/ By DALLAS W. COX, JR.
Attorneys for Appellant David Heckethorn

THURMAN, NIXON, SMITH, HOWALD, WEBER & BOWLES

/s/ By ROBERT LEE SMITH
Attorneys for Appellants Lillian & Albert Agers

/s/ A. E. NICK
Attorney for Appellant Hugh E. Bearden, III

GUNN & GUNN

/s/ By JAMES F. GUNN
Attorneys for Appellant Beverly Cleary

Proof of Service

I, Dallas W. Cox, Jr., one of the attorneys for appellants herein and a member of the Bar of the Supreme Court of the United States, hereby certify that on the 25th day of November, 1975, I served a true copy of the foregoing Notice of Appeal to the Supreme Court of the United States on Respondent Hardware Mutual Casualty Company and Respondent-Third Party Defendant Executive Auto Leasing Company, by mailing in a duly addressed envelope with First Class postage prepaid to their respective attorneys of record as follows: Mr. F. Douglas O'Leary and Moser, Marsalek, Carpenter, Cleary, Jaeckel, Keaney & Brown, Attorneys for Respondent, 112 North Fourth Street, St. Louis, Missouri 63101.

It is further certified that all parties required to be served have been served.

/s/ DALLAS W. COX, JR.
Attorney for Appellant Heckethorn
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St. Louis, Missouri 63141

Supreme Court, U. S.
FILED
MAR 3 1976
MICHAEL RODAK, JR., CLERK

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-967

HUGH E. BEARDEN, III, LILLIAN M. AGERS, ALBERT E. AGERS, BEVERLY CLEARY and DAVID HECKETHORN,
Appellants,

v.

HARDWARE MUTUAL CASUALTY COMPANY, a Corporation, et al.,
Appellees.

On Appeal from the Supreme Court of Missouri

MOTION TO DISMISS OR AFFIRM

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Section 536.120 RSMo, 1969 6
Title 28 U.S.C. § 1257(2) 3, 5

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1975

No. 75-967

HUGH E. BEARDEN, III, LILLIAN M. AGERS, ALBERT E. AGERS, BEVERLY CLEARY and DAVID HECKETHORN,
Appellants,

v.

HARDWARE MUTUAL CASUALTY COMPANY, a Corporation, et al.,
Appellees.

On Appeal from the Supreme Court of Missouri

MOTION TO DISMISS OR AFFIRM

Appellees in the above entitled case move the Court to dismiss the appeal herein or, in the alternative, to affirm the judgment for the reason that: (1) The federal question sought to be reviewed was not decided by the Supreme Court of Missouri; (2) The federal question sought to be reviewed was only collaterially involved in the State Court and was not decided or determined in a manner which would properly allow it to be reviewed by this Court and (3) In any event, there is no substantial federal question involved.

The Federal Question Sought to Be Reviewed Was Not Decided by the Supreme Court of Missouri.

Examination of the record herein shows that the Missouri Supreme Court did not decide the matter below on any grounds involving the Constitution of the United States.

Appellants' Point IV raised in their briefs before the Missouri Court of Appeals, St. Louis District and considered by the Supreme Court on the transfer of the case to that Court was stated in pertinent part as follows:

> ". . . Section 303.330 of the Revised Statutes of Missouri is unconstitutional . . ."

No other statutory section was referred to either in the point or in the argument. The Supreme Court of Missouri specifically stated that it did not reach this constitutional question. In its opinion quoted in the Appellants' Appendix at Page A-4 the Court said:

> "After submission, but prior to opinion, the (Missouri Court of Appeals, St. Louis District) transferred the case to this Court on the jurisdictional basis of the constitutionality of Section 303.330 RSMo. 1969. In view of our disposition of the matter, we do not reach the constitutional question. However, jurisdiction once acquired is not lost because the appeal may be disposed of on other grounds."

The Supreme Court explained its position in a subsequent portion of its opinion set forth in Appellants' Appendix at Page A-8 where the Court said:

> "We need not, and should not, decide the constitutionality of Section 303.330 . . . We are dealing with a resuspension for failure to file proof of financial responsibility, as required by Section 301.150 (2)."

Analysis of the opinion and the Statutes referred to demonstrate that the Court was clearly correct. Section 303.330 relates to the driver's duty to return his license to the State Director of Revenue. It is Section 301.150 (2) which makes it mandatory that he keep his insurance in force in order to keep his license.

It seems clear that the Supreme Court of Missouri was not required to consider a constitutional question with regard to a Statute which was not referred to in the briefs filed before it. Rule 84.04 (d) of the Missouri Rules of Court requires that any matter being questioned be specifically raised in the "Points Relied On". The courts in Missouri like most of the courts in the country are burdened with a tremendous case load. Litigants and lawyers have been warned that the procedural rules in Missouri will be adhered to and enforced. They have been told in the plainest possible language that the Courts will not search the record for error. See particularly *Kerr v. Ehringer, Inc.*, 515 S.W. 2d 763, 765 (Mo.App.1973); see generally *State ex rel. Danforth v. Independence Dodge, Inc.*, 494 S.W. 2d 362 (5) (Mo.App.1973) and *Graff v. Montileone*, 523 S.W. 2d 131 (Mo.App.1975).

Under all the circumstances, the record shows that the Missouri Supreme Court specifically avoided a decision with regard to the constitutionality of the Statute and that under its long established, uniformly enforced, procedural rules it was entitled to do so. In these circumstances there is no basis for appeal. Title 28 United States Code Section 1257(2).

The Federal Question Sought to Be Reviewed Was Only Collaterally Involved in the State Court and Was Not Decided or Determined in a Manner Which Would Properly Allow It to Be Reviewed by This Court.

The instant case involves a problem which appears to be unique.

The action herein involved a question of the coverage afforded under a policy of automobile insurance. Because one of the grounds for non-coverage was based on the absence of a valid driver's license, a portion of the evidence presented in the trial court included the records of the Department of Revenue of the State of Missouri with regard to the status of that driver's license.

Those records established the original suspension of the license, the conditional return of the license to appellant Bearden III and then the automatic resuspension for failure to maintain proof of financial responsibility.

That record did not show any effort at any time by appellant Bearden or any other appellant to question the action of the Missouri Department of Revenue in any proceedings in which that agency or the State was a party. The record establishes instead that apparently the only attempt ever to question the validity of the proceedings by the State agency was in the instant case.

It is clear that the claims of invalidity constitute a collateral attack on the proceedings of the State agency involved. *Callanan Road Improvement Co. v. United States*, 345 US 507, 73 S Ct 803, 97 L Ed 1206. The law in Missouri like the law generally is that the judgments of an administrative agency may not be collaterally attacked, but may only be set aside by direct proceedings. *State v. F. W. Woolworth Co.*, 159 S.W. 2d 297 (Mo. 1942).

In a direct proceeding, the State of Missouri would be a party and would have an opportunity to present evidence, cross-examine witnesses and have a full hearing. Because the matter has been raised collaterally the State of Missouri is not a party and has not had an opportunity to participate or be heard.

All issues which might have been tried in a direct proceeding were not fully covered. There is no evidence as to proce-

dures and regulations of the State agency. The evidence presented in the instant case was confined to what the records showed with regard to the status of the driver's license.

The question now is whether the Supreme Court of the United States has jurisdiction to decide an alleged federal question not directly involved, but only collaterally raised in circumstances where the State of Missouri, a clearly interested party, is not a party to the litigation and has not had an opportunity to be heard.

We would submit that Title 28 USC 1257 cannot be logically construed as authorizing review by the Supreme Court in these circumstances and must necessarily authorize appeals only where a federal question is directly involved and where the parties to be affected by the ruling have been fully heard. It seems inconceivable that it could be raised by way of a collateral attack on the result in a separate proceeding and bind persons who are not parties.

In Any Event, There Is No Substantial Federal Question Involved.

Analysis of the record establishes that appellants have omitted important matters relating to the issue they seek to raise. So that the Court can consider the matter in context, it is necessary that the Court be alerted to the fact that there are applicable certain Missouri Statutory Sections in addition to those mentioned by appellants.

What is now Chapter 303 of the Revised Statutes of Missouri has at all times applicable included provisions for notice and hearing. Section 303.030(2) specifically provides for prior notice and hearing before suspension of the license of a Missouri citizen. As applicable in that regard it states:

". . . provided notice of such suspension shall be sent by the director to such operator and owner not less than ten days prior to the effective date of such suspension and shall state the amount required as security."

The Missouri Statutes relating to the Financial Responsibility law also provide for hearing. Section 303.290 states:

"303.290. Director's duties—regulations—judicial review

1. The director of revenue shall administer and enforce the provisions of this chapter and may make rules and regulations necessary for its administration and shall provide for hearings upon request of persons aggrieved by orders or acts of the director under the provisions of this chapter.

2. Any decision, finding or order of the director, under the provisions of this chapter, shall be subject to review by appeal to the circuit court of the county of the residence of the licensee, at the instance of any party in interest, in the manner provided by chapter 536 RSMo, at any time within thirty days after notice is given the licensee of such decision, finding or order. Upon such appeal the cause shall be heard *de novo* and the circuit court may determine the reasonableness of the director's decision, finding or order, and in disposing of the issues before it may modify, affirm, or reverse the decision, finding or order in whole or in part. Appeals from the judgment of the circuit court may be taken as in civil cases. The prosecuting attorney of the county where such appeal is taken shall appear in behalf of the director, and prosecute or defend as the case may require."

The Court will note that Section 303.290 refers to Chapter 536 of the Missouri Revised Statutes. That chapter contains the Missouri Administrative Review Act. Section 536.120 of that Act provides for suspension or stay of administrative orders. The above mentioned provisions are extremely important because they show that pre-suspension hearing is provided and that as to other administrative acts Missouri Law provides for judicial review and suspension or stay of the administrative order complained about "at any time within thirty days after notice is given the licensee . . ." of such order.

Bearden III has complained that he didn't know about the resuspension of his license. However his assertion in that regard ignores the notice given to him by this law itself and is hardly convincing on the facts. The evidence concerning the notice to him is set forth on pages 9, 10 and 11 of Respondent's Brief filed with the Missouri Court of Appeals, St. Louis District and the arguments arising from such evidence appear on page 36 of our Brief below. As pointed out in the brief Hugh Bearden III was repeatedly given notice and specific information concerning the suspension for failure to maintain his insurance in force.

First, he was put on notice by the law itself that he would be required to return his license to the Department of Revenue if he didn't maintain his insurance. Section 303.150(2) advised him that he had maintain his insurance. Section 303.330 RSMo. told him he would be required to return his license if he didn't.

Further, he was told in the original lift notice, as pointed out by the Supreme Court, of this requirement that he keep his insurance in force and he knew, from his own testimony, that he had stopped paying for the insurance and had allowed it to lapse (Bearden deposition 12, 13). If that wasn't enough, the Mission Insurance Company, the company which he had asked to file certification of its coverage with the State of Missouri, advised him of the cancellation of the insurance. (Snyder deposition, Exhibit 7).

Finally, after he had attempted to renew the license, he was, according to the records of the Safety Responsibility Unit (Abbott deposition Exhibit 12), specifically told by a letter directed

to him and dated April 17, 1967 that his license had been re-suspended and that the Safety Responsibility Unit was holding it.

Thus the record in the instant case showed not only that Bearden had notice by the terms of the law itself, but that he had been told of the consequences of a failure to maintain his insurance and he knew and had been told about the cancellation of that insurance and its effect and finally that he was told about the suspension by correspondence properly addressed.

The cases cited by appellants have involved an obviously different type of problem than the one existing in the instant case. *Bell v. Burson*, 402 US 535, dealt with the requirement of a hearing as to fault in connection with a license suspension based upon a determination as to fault. The other cases cited have also generally involved the need for a prior hearing with regard to the impairment of a property right based upon a fact issue which requires some judgmental decision or interpretation of evidence. Those cases did not involve an automatic determination directed by the law on the basis of the existence of a fact which can and necessarily must be established by documentation.

A suspension of appellant Bearden's license did not depend in the instant case on a discretionary act of a state officer based upon consideration of conflicting evidence or interpretation of evidence which might be subject to different interpretations. Rather in the instant case, Bearden under the provisions of Section 303.170 was required to have filed with the State of Missouri a certificate of insurance coverage and to maintain that insurance in force. The statute was clearly not satisfied by a "claim" by Bearden III that he might have coverage under some policy or by some other excuse, but only by the filing of the certificate.

It is clearly immaterial, therefore, that Bearden III might have claimed coverage under Appellee's policy or any other

policy. The controlling fact determining his right to keep his license was whether or not a certificate of coverage was on file with the Department of Motor Revenue. The record is clear that Mission Insurance Company cancelled his coverage and there was no certificate of coverage on file as required by the Law.

In our research, we have found no requirement in the cases dealing with due process that there be a hearing with respect to the kind of issue here involving a fact to be established by this kind of documentation. For example, so far as we have been able to determine there is no due process case decided by any court that would hold that a license cannot be revoked or cancelled for non payment of the fee required or for failure to file reports required by law. The situation in the instant case seems at least analogous to that in *Breiholz v. Pocahontas County*, 257 US 118, 42 S Ct 13, 66 L Ed 159, where the Court pointed out that a hearing is not required with regard to a matter which involves a simple calculation of taxes and a legislative direction as to the assessment to be made.

More specifically, this Court in *Mitchell v. W. T. Grant Co.*, 416 US 600, 94 S Ct 1895, 40 L Ed2d 406, has recognized that, where what is involved is simple documentary proof of a matter, then pre-hearing action can be valid at least where a method of post-action review is provided. See also *People v. Sherman*, 291 N.E.2d 865, involving the same elements. Those factors exist in the instant case. The instant case does not involve a suspension of a license without hearing based on a "fault standard". It provides a right of hearing before suspension, then for conditional return of the license and warns the licensee of the consequences of the failure to perform the condition. The resuspension involved here is automatic, as stated by the Law, on failure to perform the condition. It occurs without judgmental discussion by the agency involved which might be affected by hearing. And finally, this automatic resuspension is

based on a fact which is simple and clear involving as it does the existence of a document showing an insurance company which has certified coverage.

The record herein shows that appellants' complaints about the lack of notice to Bearden are without merit. He is not only presumed to know the law and the legal consequences of his acts and was told by the law of such consequences, but as pointed out above, he was given actual notice of such consequences.

Similarly the complaints of appellants with regard to the lack of hearing are without merit. Under the law in question, as pointed out above, there was provision for pre-suspension hearing wtih regard to the original suspension and further hearing, if requested, with regard to the automatic resuspension provided for by the law. Under *Mitchell v. W. T. Grant*, supra, the Missouri Statutory Sections in question seem clearly to have provided adequate safeguards for the rights of Appellant Bearden.

Respectfully submitted

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